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No. 03-1265

Supreme Court, U.S.
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In the Supreme Court of the United States

PHILIP CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
PETITIONERS

v.

ELIO RIVERON AGUILERA

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORIARI

Christine Stebbins Dahl
Assistant Federal Defender
101 SW Main Street, Suite 1700
Portland, Oregon 97204
(503) 326-2123
Counsel for Respondent

QUESTION PRESENTED

In *Zadvydas v. Davis*, 533 U.S. 678 (2001), this Court considered the government's authority under 8 U.S.C. § 1231(a)(6) to continue to detain for the purpose of removal those persons whose removal from the United States could not be accomplished in the reasonably foreseeable future. This Court interpreted the statute to limit such detention to a "reasonable time," and applied it to former permanent residents. In this case, the Ninth Circuit Court of Appeals, citing *Lin Guo Xi v. INS*, 298 F.3d 832 (9th Cir. 2002), summarily affirmed the application of *Zadvydas* to Elio Riveron Aguilera, a Mariel Cuban who was ordered excluded in 1980 and again in 1986, after he had been paroled into the United States. Parole was again revoked in 1999. Although it detained Mr. Riveron Aguilera under section 1231(a)(6), the government made scant effort to remove him to Cuba, conceded it was unable to do so within the foreseeable future, and ultimately asked the Ninth Circuit to summarily affirm the district court's conditional release order pursuant *Lin Guo Xi*. Given that section 1231(a)(6) draws no distinction between individuals who are removable on grounds of inadmissibility and those removable on grounds of deportability, this case presents the question whether the Ninth Circuit correctly applied *Lin Guo Xi*, in which it adhered to this Court's statutory construction of section 1231(a)(6) in *Zadvydas*.

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BRIEF IN OPPOSITION

Petitioner Philip Crawford, Interim Field Office Director, Seattle, Washington, and U.S. Immigration Customs Enforcement[1] seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit. The government has asked this Court to hold its petition pending final resolution of the petitions to review *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), *cert. granted*, 124 S.Ct. 1143 (2004) (No. 03-7434), and *Crawford v. Martinez*, CA 03-35053 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 1507 (2004) (No. 03-878). Although the question presented here cannot seriously be distinguished from those in *Benitez* or *Crawford*, the Ninth Circuit resolved it correctly and the Eleventh Circuit did not. Mr. Riveron Aguilera agrees the government's petition should be held pending this Court's decision in *Benitez* and *Crawford*.

OPINIONS BELOW

The order of court of appeals is unreported and appears at Appendix A to the Petition. The orders of the district court are unreported and appear at Appendices B and C to the Petition.

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[1]The petition for writ of certiorari alleges incorrectly that the Immigration and Naturalization Service (INS) was a party to the district court proceedings. Mr. Riveron Aguilera sued Ronald J. Smith, in his official capacity as the then district director of the INS and John Ashcroft, in his official capacity as Attorney General of the United States; the petition did not name the INS as party-respondent. *See Petition for Habeas Corpus Relief* (CR 1); 28 U.S.C. §§ 2241, 2242; FED. R. CIV. PRO. 25(d)(2).

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. §1254(1). The government's petition appears to have been timely filed.

STATEMENT

An error in the government's statement require correction. The government has never before suggested that Mr. Riveron Aguilera attempted to enter the United States illegally. *Petition* at 4 ("Respondent is one of approximately 125,000 Cuban nationals, many of them convicted of crimes in Cuba, who attempted to enter the United States illegally during the 1980 Mariel boatlift."). In fact, he did not. He fled Cuba by boat as part of the "Freedom Flotilla" that enjoyed U.S. government approval.[2] Mr. Riveron Aguilera arrived in Key West, Florida on May 31, 1980, and was immediately paroled into United States pursuant to 8 U.S.C. § 1182(d)(5). *Petitioner's Exhibit A-4, A-13* (CR 14). By order dated December 15, 1980, upon his

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[2]Comments by President Carter at a press conference in Miami on May 5, 1980, indicated government approval of the flotilla:

> [L]iterally tens of thousands of others will be received in our country with understanding, as expeditiously as we can, as safely as possible on their journey across the 90 miles of ocean, and processed in accordance with the law. ... But we'll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from economic deprivation, brought about primarily by Fidel Castro and his government.

United States v. Frade, 709 F.2d 1387 (11th Cir. 1983).

application for asylum, Mr. Riveron Aguilera's parole was terminated and he was ordered excluded and deported due to his criminal history in Cuba. *Id.* at A-14.

Unable to remove him to Cuba, the INS paroled Mr. Riveron Aguilera on January 20, 1982. *Id.* at A-10. After Mr. Riveron Aguilera sustained criminal convictions, the INS revoked his parole in 1985. *Id.* He again applied for asylum, which the INS denied in 1986, resulting in a second exclusion and deportation order. *Id.* After being paroled in 1988, Mr. Riveron Aguilera returned to INS custody in 1999 after he sustained additional criminal convictions. The INS released him in March 2003 pursuant to the district court's writ of habeas corpus. CR 42; App. B.

CONCLUSION

Mr. Riveron Aguilera agrees that the government's petition should be held pending the Court's decision in *Benitez* and *Crawford*.

Respectfully submitted,

Christine Stebbins Dahl
Assistant Federal Defender
101 S.W. Main Street, Suite 1700
Portland, OR 97204
(503) 326-2123
Counsel for Respondent

April 2004

No. 03-1265

In the Supreme Court of the United States

PHILIP CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, SEATTLE, WASHINGTON, UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL.,
PETITIONERS

v.

ELIO RIVERON AGUILERA

CERTIFICATE OF SERVICE AND MAILING

I, Christine Stebbins Dahl, counsel of record and a member of the Bar of this Court, certify that pursuant to Rule 29.2, service has been made of the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION on the counsel for the petitioners by depositing in the United States Post Office, in Portland, Oregon on April 8, 2004, first class postage prepaid, two

true, exact and full copies thereof addressed to:

Theodore B. Olson
Solicitor General
Department of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

Peter D. Keisler
Assistant Attorney General
Office of Immigration Litigation
Civil Division – Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Edwin S. Kneedler
Deputy Solicitor General
Department of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

Patricia A. Millett
Assistant to the Solicitor General
Department of Justice, #5614
10th & Constitution, N.W.
Washington, D.C. 20530

Donald E. Keener, Attorney
John Andre, Attorney
Office of Immigration Litigation
Civil Division – Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Judith D. Kobbervig
Assistant United States Attorney
United States Attorney's Office
600 U.S. Courthouse
1000 SW Third Avenue
Portland, OR 97204-2902

Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on April 8, 2004, with first-class postage prepaid.

Christine Stebbins Dahl
Counsel for Respondent